

EXHIBIT B



May 7, 2019

VIA ELECTRONIC MAIL

Dionne Hardy
725 17th Street NW
Suite 9204
Washington, DC 20503
OMBFOIA@omb.eop.gov

Re: Freedom of Information Act Records Request

Dear Ms. Hardy:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., and the Office of Management and Budget (“OMB”) FOIA regulations at 5 C.F.R. Part 1303, Democracy Forward Foundation (“Democracy Forward” or “DF”) makes the following request for records.

Records Requested:

In an effort to better understand and explain to the public the influence of industry on the review, stay, and implementation of the EEO-1 Component 2 pay data collection on gender, race, and ethnicity, Democracy Forward Foundation requests that OMB produce the following on an expedited processing schedule:

- Any and all records revealing discussions regarding the U.S. Equal Employment Opportunity Commission’s (“EEOC”) EEO-1 Component 2 pay data collection between OMB and any employees or representatives of any trade associations, lobbyists, or law firms, including but not limited to
 - Chamber of Commerce of the United States
 - HR Policy Association
 - Associated Builders and Contractors
 - Associated General Contractors of America
 - Center for Workplace Compliance

- Institute for Workplace Equality
- National Association of Manufacturers
- National Federation of Independent Business
- National Retail Federation
- Restaurant Law Center
- Retail Litigation Center, Inc.
- Society for Human Resource Management
- DirectEmployers Inc
- American Society of Employers
- Seyfarth Shaw LLP
- U.S. Chamber Litigation Center
- McGuiness, Yager & Bartl LLP
- Fortney & Scott
- Manufacturers' Center for Legal Action
- Retail Litigation Center
- Society of Human Resource Management
- Isler Dare, P.C.
- Fox Wang Morgan
- Littler Mendelson
- Littler Workplace Policy Institute
- Ogletree Deakins
- Business Roundtable

The search period is October 31, 2018 to the date the search is completed.

This request is limited to the Office of Information and Regulatory Affairs (OIRA), the Office of the Director, the Office of the General Counsel, Office of the Deputy Director, Resource Management Offices, and Office of Legislative Affairs.

Scope of Search

For responsive records, please search for records regardless of format, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical materials. This request includes, without limitation, all correspondence, letters, emails, text messages, calendar entries, facsimiles, telephone messages, voice mail messages, and transcripts, notes, minutes, or audio or video recordings of any meetings, telephone conversations, or discussions. In searching for responsive records, however, please exclude publicly available materials such as news clips that mention otherwise responsive search terms.

FOIA requires agencies to disclose information, with only limited exceptions for information that would harm an interest protected by a specific exemption or where disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A). In the event that any of the requested documents cannot be disclosed in their entirety, we request that you release any material that can be reasonably segregated. *See id.* § 552(b). Should any documents or portions of documents be withheld, we further request that you state with specificity the description of the document to be withheld and

the legal and factual grounds for withholding any documents or portions thereof in an index, as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Should any document include both disclosable and non-disclosable material that cannot reasonably be segregated, we request that you describe what proportion of the information in a document is non-disclosable and how that information is dispersed throughout the document. *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

If requested records are located in, or originated in, another agency, department, office, installation or bureau, please refer this request or any relevant portion of this request to the appropriate entity.

Please respond to this request in writing within 10 days as required under 5 C.F.R. § 1303.10(d)(4). If all of the requested documents are not available within that time period, we request that you provide us with all requested documents or portions of documents that are available within that time period. If all relevant records are not produced within that time period, we are entitled to a waiver of fees for searching and duplicating records under 5 U.S.C. § 552(a)(4)(A)(viii)(I).

Request for Expedited Processing

Democracy Forward is entitled to expedited processing of the request because there is a “compelling need” for the information,” specifically “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity,” 5 U.S.C. §§ 552(E)(i)(I), 552(E)(v)(II); *see also* 5 C.F.R. § 1303.10(d)(1)(ii), and as “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which effect public confidence,” 5 C.F.R. § 1303.10(d)(1)(iv).

There is “a particular urgency to inform the public about the government activity involved in the request” demonstrated by the significant media attention to the issue of pay equity generally¹ and the implementation of EEO-1 Component 2 specifically. *Id.* § 1303.10(d)(3). The EEOC had determined that the EEO-1 Component 2 collection was necessary to enforce the nation’s civil rights laws. Without these pay data requirements, race and gender pay gaps at roughly 60,886 employers—collectively employing 63 million workers—could continue to be shielded from scrutiny for discriminatory pay practices. Thus, the rescission of the collection in 2017 generated media interest,² which only increased when recently, due to litigation brought by Democracy

¹ See, e.g., Maurie Backman, The Gender Pay Gap Is Closing, But There’s Still Work To Do, Yahoo! Finance (May 6, 2019),

<https://finance.yahoo.com/news/gender-pay-gap-closing-still-124800662.html>; Emma Jacobs, Why Radical Transparency About Salaries Can Pay Off, Financial Times (May 5, 2019), <https://www.ft.com/content/11403170-6cc9-11e9-a9a5-351eeaef6d84>; Susan Galer, How To Close The Gender Pay Gap Once And For All, Forbes (April 11, 2019), <https://www.forbes.com/sites/sap/2019/04/11/how-to-close-the-gender-pay-gap-once-and-for-all/#63c3b38c50bc>.

² See, e.g., Ted Mann, White House Won’t Require Firms to Report Pay by Gender, Race, Wall Street Journal (Aug. 29, 2017),

Forward, the court reinstated the collection.³ Moreover, the Court has ordered EEOC to complete the collection by September 30, 2019. If there are any irregularities in the process, it will be critical to identify them ahead of that date. Given the significant public attention and the time-sensitive nature of the subject matter, there is plainly an urgent need to inform the public concerning the government activity at issue here. *See* 5 U.S.C. § 552(E)(v)(II).

Further, this is a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which effect public confidence. *Id.* § 1303.10(d)(1)(iv). As described above, media attention on the issue generally and EEO-1 Component 2 has been widespread and exceptional. The government's behavior also raises questions about the integrity of its decisionmaking and the public confidence in the same. As explained by the court in its decision to reinstate EEO-1 Component 2, the government "does not have clean hands" in its decision to stay Component 2.⁴ The government's rationale was "speculative, generalized, and, at times, unsubstantiated," it undertook "no meaningful review" despite basing its decision on such a review, and the government withheld key information during the course of litigation.⁵ It also withheld from the Administrative Record an internal government memorandum that disavows the stated reason for the stay of the pay data collection.⁶

<https://www.wsj.com/articles/white-house-wont-require-firms-to-report-pay-by-gender-race-1504047656?mod=e2tw>.

³ *See, e.g.*, Ted Hesson, Politico: Morning Shift (May 6, 2019) ("The Trump administration appealed a decision related to EEOC pay data collection"); Law360, What To Expect From New EEOC Pay Data Demands (May 2, 2019),

https://www.law360.com/publicpolicy/articles/1154647/what-to-expect-from-new-eeoc-pay-data-demands?nl_pk=9c8a0c1b-9c8f-4c4b-bf29-dcf59464ba91&utm_source=newsletter&utm_medium=email&utm_campaign=publicpolicy; Law360, EEOC To Start Collecting Employers' Pay Data In July (April 30, 2019),

https://www.law360.com/publicpolicy/articles/1154821/eeoc-to-start-collecting-employers-pay-data-in-july?nl_pk=9c8a0c1b-9c8f-4c4b-bf29-dcf59464ba91&utm_source=newsletter&utm_medium=email&utm_campaign=publicpolicy; Alexia Fernández Campbell, Trump tried to sabotage a plan to close the gender pay gap. A judge wouldn't have it., Vox (April 26, 2019),

<https://www.vox.com/2019/4/26/18515920/gender-pay-gap-rule-eeoc>;

Daniel Wiessner, Judge says Trump administration improperly blocked sex, race pay data rule, Reuters (Mar. 5, 2019),

<https://www.reuters.com/article/us-usa-lawsuit-paydata/judge-says-trump-administration-improperly-blocked-sex-race-pay-data-rule-idUSKCN1QM224?il=0>

⁴ Democracy Forward, Court Orders Administration to Collect Equal Pay Data by September (April 26, 2019),

<https://democracyforward.org/updates/court-orders-administration-to-collect-equal-pay-data-by-september/>.

⁵ *Id.*

⁶ Democracy Forward, Trump Administration Admits Unlawful Stay of Equal Pay Data Collection Done at Request of Big Business Lobbyists (Jan. 16, 2019),

<https://democracyforward.org/updates/trump-administration-admits-unlawful-stay-of-equal-pay-data-collection-done-at-request-of-big-business-lobbyists/>.

This memorandum states that the only concrete justification the Administration provided was “not a significant change that warrants … reconsideration.”⁷ Finally, industry lawyers and lobbyists—the very individuals who this request targets—who objected to equal pay transparency had frequent access to OMB leadership between February and August 2017.⁸ Now those same lawyers and lobbyists are threatening collateral litigation against the reinstated collection⁹ while the government seeks to appeal the court’s decision. These circumstances raise significant questions, which this request seeks to answer, about government integrity and public confidence.

Democracy Forward is a “person primarily engaged in disseminating information” for purposes of 5 U.S.C. § 552(E)(v)(II). Democracy Forward’s primary mission is to “help expose … corruption in the Executive Branch,” carried out with “a commitment to educating the public [and] bring[ing] together a team of experienced litigators, analysts, and communicators to ensure that when the government acts unlawfully, the public know about it.”¹⁰ Documents that Democracy Forward has obtained via FOIA and, when necessary, fought for in court have been the subject of numerous news stories of significant public interest.¹¹ As part of its core mission to educate the public about improper government activity, Democracy Forward intends to use the materials gathered pursuant to this FOIA to educate the public through its website, press releases, and social media outlets. The second factor for expedited processing is thus satisfied as well. *See* 5 C.F.R. § 1303.10(d)(3) (noting that “information dissemination … need not be [the requester’s] sole occupation”).

Fee Waiver Request

⁷ *Id.*

⁸ *Id.*

⁹ *See* John C. Cox, OFCCP Week in Review: April 1, 2019, DirectEmployers Association (April 1, 2019) (“There is an opportunity (soon) down the road for such an employer legal attack on the EEOC Rule as arbitrary and capricious and otherwise not in accordance with the law”), <https://directemployers.org/2019/04/01/ofccp-week-in-review-april-1-2019/>; Jim Parette, EEOC to Require Employers to File 2017, 2018 Compensation Data by September 30, 2019, Littler (May 2, 2019) (“We will provide further information on the mechanics of filing Component-2 as soon as any becomes available. Littler’s Workplace Policy Institute (WPI) continues to analyze options with respect to the court’s ruling. Those interested in these efforts should contact the author.”), <https://www.littler.com/publication-press/publication/eecr-require-employers-file-2017-2018-compensation-data-september-30>.

¹⁰ Democracy Forward, Who We Are, <https://democracyforward.org/about/> (last visited Dec. 21, 2018).

¹¹ *See, e.g.* Vera Bergengruen, New Emails Show What Happens When The Pentagon Has To Scramble To Catch Up To Trump, BuzzFeed News (July 25, 2018), [https://www.buzzfeednews.com/article/verabergengruen/these-emailsshow-what-happens-when-the-white-house-keeps\(citing to emails obtained through a request for documents made by Democracy Forward under the FOIA\); see also Democracy Forward \(@DemocracyFwd\), Twitter \(July 27, 2018, 8:45 AM\), https://twitter.com/DemocracyFwd/status/1022870550769754112.](https://www.buzzfeednews.com/article/verabergengruen/these-emailsshow-what-happens-when-the-white-house-keeps(citing to emails obtained through a request for documents made by Democracy Forward under the FOIA); see also Democracy Forward (@DemocracyFwd), Twitter (July 27, 2018, 8:45 AM), https://twitter.com/DemocracyFwd/status/1022870550769754112.)

Democracy Forward Foundation requests a waiver of document search, review, and duplication fees because the disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 1303.70. Democracy Forward Foundation also requests a waiver of search fees on the ground that it qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 5 C.F.R. § 1303.30.

The disclosure of requested records is “likely to contribute significantly to public understanding of the operations or activities of the government” because the records sought will illuminate how industry may have attempted to influence the review, stay, and subsequent implementation of the EEOC EEO-1 Component 2 data collection, which collects vital information related to pay disparity based on gender, race, and ethnicity. As described above, news accounts following the implementation of EEO-1 Component 2 underscore the public interest in the documents sought. 5 U.S.C. § 552(a)(4)(A)(iii). Democracy Forward Foundation is a nonprofit organization organized under Internal Revenue Code § 501(c)(3) and is dedicated to promoting policy engagement and civic education. As a nonprofit organization, it does not have a commercial interest in the records and the records obtained from this request will be made available to the public at no cost. *See* 5 C.F.R. § 1303.70.

Democracy Forward Foundation also requests a waiver of search fees because it is a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Democracy Forward Foundation meets the definition of “representative of the news media” because it gathers information, exercises editorial discretion in selecting and organizing documents and, where appropriate, “distributes the resulting work to the public.” *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). A core mission of Democracy Forward Foundation is to educate the public about improper government activity, and it intends to use the materials gathered to educate the public through its website, press releases, and social media outlets.¹² It is therefore a “representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 5 C.F.R. § 1303.30.

Accordingly, Democracy Forward Foundation qualifies for a fee waiver.

If the request for a waiver is denied, we are willing to pay all reasonable fees incurred for searching and duplicating records in responding to this request, up to \$100. If the costs of

¹² *See, e.g.* Vera Bergengruen, New Emails Show What Happens When The Pentagon Has To Scramble To Catch Up To Trump, BuzzFeed News (July 25, 2018), <https://www.buzzfeednews.com/article/verabergengruen/these-emailsshow-what-happens-when-the-white-house-keeps>(citing to emails obtained through a request for documents made by Democracy Forward under the FOIA); *see also* Democracy Forward (@DemocracyFwd), Twitter (July 27, 2018, 8:45 AM), <https://twitter.com/DemocracyFwd/status/1022870550769754112>.

responding to this request should exceed that amount, please contact us before incurring costs exceeding that amount.

Conclusion

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles in meeting the request within 20 working days, please contact Jeff Dubner at foia@democracyforward.org.

We appreciate your assistance and look forward to your prompt response.

Sincerely,

/s/ Jeff Dubner
Counsel
Democracy Forward Foundation

Certification of Need for Expedited Processing

I hereby certify that the information provided in the request for expedited processing is true and correct to the best of my knowledge.

May 7, 2019.

/s/ Jeff Dubner
Counsel
Democracy Forward Foundation